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Summary record of the 824th meeting
Held at Headquarters, New York, on Tuesday, 27 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

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The meeting was called to order at 3.10 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*)

Chapter IV bis. Interim measures and preliminary orders (*continued*)

Section 3. Provisions applicable to interim measures and preliminary orders (*continued*)

Article 17 septies. Disclosure (*continued*)

1. **The Chairman** invited the Commission to reopen discussion of article 17 septies, paragraphs 1 and 2, of the draft legislative provisions on interim measures and preliminary orders, set out in document A/CN.9/605 concerning settlement of commercial disputes.

2. **Ms. Kirby** (Observer for the International Chamber of Commerce (ICC)) said that the following amendments to article 17 septies had been agreed upon during informal consultations at the close of the previous meeting. Paragraph 1 would be amended to read: "The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which an interim measure was requested or granted". The last sentence of paragraph 2 would be amended to read: "Thereafter, paragraph 1 of this article shall apply".

3. Some participants had wanted to delete paragraph 1 altogether because they saw it as an overregulation of the arbitral process. But the Working Group had long since opted to give very detailed guidance, and she believed that the paragraph, which provided information that was not necessarily obvious to arbiters throughout the world, should be retained.

4. **Mr. Uzelac** (Croatia) said that, in principle, it was not a good practice to reopen discussion on provisions that had been adopted. Furthermore, many delegations liked the text as it stood, and the amendments just introduced, rather than improve the text as purported, would actually have the opposite effect. The wording of amended paragraph 1 might well lead to the conclusion that the requesting party had no obligation to disclose unless required to do so by a judge; whereas, in fact, there was an ongoing duty to disclose, in the interests of loyal cooperation and fairness of proceedings. It would be better to delete paragraph 1 than to embark on a redrafting that conveyed unintended meanings. The general provision originally adopted should not prove hard to apply under either civil or common law. His delegation would not support the amendments.

5. **The Chairman** explained that it had been decided exceptionally, to consider a new draft of article 17 septies in order to satisfy the concerns which had emerged during informal consultations that the text adopted at the previous meeting did not convey what the Working Group had in mind. The point was not to address possible problems arising from differences between the civil and common law systems.

6. **Mr. Graham Tapia** (Mexico) agreed with the representative of Croatia that the proposed wording created problems. Saying that the arbitral tribunal *might* require disclosure could actually have the effect of curtailing the broad powers given to the tribunal under the UNCITRAL Model Law on International Commercial Arbitration. He recalled that at the previous meeting his delegation had proposed a different solution: the deletion of paragraph 1 and of the last sentence of paragraph 2. If that proposal was not acceptable and if it was the consensus to accept the ICC variant, an explanatory note should be included, giving the Working Group's precise views on the scope of the requesting party's duty to disclose all material circumstances.

7. **Mr. López** (Chile) said that he supported the original deletions proposed by Mexico. No lawyer would voluntarily furnish information about changed circumstances, and it was up to the judge to require such information.

8. **Mr. Chan** (Singapore) said that if the Commission took the irregular step of reconsidering an adopted text, he would suggest retaining the original article 17 septies, and making the first sentence of paragraph 2 the first paragraph of the article, because it set out the general principle of the obligation to disclose all relevant circumstances, which could be termed a duty of utmost good faith.

9. To accept the ICC variant would mean that the party requesting an interim measure or applying for a preliminary order would have an obligation to disclose new circumstances only at the time the measure or order was granted, but not at a later stage; and that it was instead the duty of the arbitral tribunal to obtain disclosure of any material change in circumstances. Several questions then arose: could the arbitral tribunal issue continuing orders conditional upon disclosure of changes in material circumstances, and if so, was it the tribunal's duty to do so? If instead the tribunal could issue orders requiring disclosure of material changes only as and when deemed necessary, it was not clear how it would decide when to issue them. On balance, the ICC proposal raised more difficulties than it solved.

10. His delegation cautioned against deleting article 17 septies as a whole: clearly any interim order must be based on full disclosure and that had to be reflected in the text in order to maintain the credibility of the process, especially for users of the process.

11. **The Chairman** recalled that the Working Group had decided to restrict itself to the concept of full and frank disclosure *ex parte*, not *inter partes*.

12. **Mr. Komarov** (Russian Federation), said that he shared the misgivings voiced concerning the ICC proposal. The current text was a good compromise between various legal systems: it offered balanced solutions and allayed many doubts. The ICC text altered the meaning of the article produced by the Working Group.

13. **Mr. D'Allaire** (Canada) said that the ICC text was much narrower in scope than the current text in that it imposed a disclosure obligation on the requesting party only until such time as an order for an interim measure was granted, whereas the current text contained no such limiting factor.

14. Article 17 septies should be retained as adopted, although his delegation could also accept the proposal made at the close of the previous meeting that would have added wording at the beginning and the end of the article. It could not, however, accept the deletion of the words "or granted" as also proposed, because the text could then be read as applying only to the time of application. His delegation also had doubts about the Singaporean suggestion, because it was the first paragraph that set out the general principle with regard to interim measures, whereas the second paragraph covered the more restrictive matter of an application for a preliminary order.

15. **Ms. Perales Viscasillas** (Spain) said that the ICC proposal did indeed change the meaning of the text. That was not a problem, however, as the Commission was meeting to refine what had been decided earlier. Moreover, many delegations present had also participated in discussions on the text in the Working Group. Her delegation would therefore be in favour of the Mexican suggestion to delete the first paragraph and the last sentence of paragraph 2. As the article would thereby address preliminary orders exclusively, it should be placed in the section on preliminary orders. If that proposal was not acceptable to the Commission, the next option would be along the lines of the ICC proposal.

16. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that there was agreement that the first sentence of paragraph 2 should remain unchanged. His delegation would support maintaining the sentence as it was regardless of where it was placed. The debate concerned paragraph 1 and the last sentence of paragraph 2 regarding the disclosure obligation.

17. His Association took issue with the statements by some delegations that the text proposed by the Secretariat was a good compromise given that it introduced an obligation which was alien to, and would create discomfort for, many international arbitration practitioners. His delegation therefore fully supported the ICC proposal, which was a true compromise. Nevertheless, he understood the concerns expressed by the representatives of Mexico, Chile and Spain and could approve the Mexican proposal to delete paragraph 1 and the last sentence of paragraph 2 and the Spanish proposal to move the article to the section on preliminary orders.

18. **Mr. Markus** (Switzerland) said that his delegation was sympathetic to the concerns raised by the Croatian representative about reopening discussion on a text which had already been adopted. That should not prevent the Commission, however, from building on lessons learned. He noted that the provision had been drawn from the Model Law on Cross-Border Insolvency. The context of insolvency, however, was not comparable to the situation with respect to arbitration. His delegation would be inclined to follow the Mexican proposal to delete paragraph 1 and the last

sentence of paragraph 2, thereby excluding interim measures and dealing only with preliminary orders. If the proposal was not supported by the majority of the Commission, then his delegation would favour the proposal made by the observer for ICC, which was a further development of the proposal made at the previous meeting to include in paragraph 1 a provision that disclosure must be ordered by the arbitral tribunal. If the Mexican proposal to delete paragraph 1 was accepted, the information contained therein should be given in an explanatory note. Paragraph 1, however, was merely for information purposes and did not belong in the Model Law itself, which should contain only "hard" provisions.

19. **Mr. Möller** (Observer for Finland) said that his delegation agreed with the representatives of Croatia and the Russian Federation that it was inadvisable to reopen the discussion on questions which had already been decided. While he had earlier expressed approval of the words "if so ordered by the arbitral tribunal", it would suffice to add them in an explanatory note, as suggested by the representative of Switzerland. He therefore recommended moving paragraph 2, without the last sentence, to the section on preliminary orders. In addition, paragraph 1 should be deleted to avoid stating the obvious or initiating any contrary conclusions.

20. **Ms. Avenberg** (Sweden) said that her delegation was in favour of the Mexican proposal for the reasons put forward by the representative of Switzerland and the observer for Finland. If that proposal did not receive the necessary support, her delegation would favour the ICC proposal.

21. **Mr. Zhao** Jian (China) said that the text of the article should be retained in the interest of justice and fairness. The party requesting an interim measure had an obligation to disclose any material change in the circumstances on the basis of which the measure was granted. His delegation was guided by the principles of continental law and took issue with the ICC proposal, which would reduce the obligations incumbent upon a party requesting an interim measure.

22. **Mr. Castello** (United States of America) said that there were at least three positions under discussion, with a fair number of supporters for each of them. One was to retain the text contained in document A/CN.9/605. Another was to delete paragraph 1 entirely and the last sentence of paragraph 2. The other was to adopt some kind of compromise language, the latest version of which had been proposed by the observer for ICC. The point of that compromise was to retain some provision which would make clear that parties could be directed by the tribunal to disclose changes of circumstance in a way that accommodated some of the objections raised by delegations favouring the deletion of the article altogether. His delegation understood those objections to be based on a legal culture in which it was unnatural to impose an obligation upon parties to disclose facts which were not helpful to their position. It also understood that those delegations whose legal culture had that view would feel more comfortable if the arbitral tribunal was required to direct the disclosure rather than make disclosure an obligation of the requesting party.

23. His delegation was comfortable with the provision as it was drafted in document A/CN.9/605. It was important, however, to try to accommodate a serious objection from a number of delegations, even if it occurred at the last stage of the Commission's deliberations. The ICC proposal did accommodate that concern while meeting the concerns of other delegations which wished to retain the essence of the provision. His delegation was therefore inclined to support it.

24. **Mr. Dervaird** (United Kingdom) said that nearly all that he had wished to say had been stated by the United States representative. While his delegation sympathized with the approach taken by the Croatian and other delegations that draft article 17 septies should simply be retained in the form in which it had been presented, for the compelling reasons put forward by the United States representative, the solution propounded by the observer for ICC appeared to be a suitable compromise and contained the same type of empowerment provision as was found in draft article 17 quinquies and sexies. Even though the matters they dealt with fell within the competence of the arbitral tribunals, it was felt that they should be included in the statute for the benefit of those tribunals. The same applied to the draft article under consideration.

25. **Mr. Chan** (Singapore) said that the views expressed by the professional arbitrators regarding current arbitration practice deserved the greatest respect. The issue under discussion involved a confrontation between practicality and principle. With respect to practicality, it was unreasonable to expect a party requesting assistance from an arbitral tribunal to

provide information which would be to that party's disadvantage. With respect to principle, it did not seem right that a party which had obtained a benefit based on certain premises should have no obligation to inform the authority which had granted those benefits that the premises were no longer valid.

26. The Commission was drafting a model law which would be incorporated into the domestic law of many States. The rules formulated would have the force of law. The Commission would be giving to arbitral tribunals powers akin to those of a court of law. Arbitral tribunals and persons who sought their assistance must therefore comply with the standards which the law expected of courts. Whenever a benefit was sought from a court, there was an ongoing obligation to disclose relevant circumstances if for no other reason, as the representative of China pointed out, than respect for the basic principles of fairness. The same should apply when rules which were peculiar to arbitration practice were enacted as rules of domestic law. The drafters of the article under consideration had been sensitive to that consideration. His delegation would therefore support the text as it currently stood.

27. **The Chairman** said that the majority opinion appeared to favour the ICC wording, which could be adopted as a compromise, with clear information provided in the explanatory material. Differences between legal systems were often exaggerated at international meetings. The obligation not to withhold relevant information in bad faith existed in all legal systems, whether such an obligation was spelled out or not. The virtue of the ICC suggestion was that it offered a compromise solution covering the various concerns of delegations.

28. If he heard no objections, he would take it that the Commission wished to adopt draft article 17 septies, as amended along the lines suggested by the observer for ICC.

29. *It was so decided.*

Amendment to article 1, paragraph 2, of the Model Law on International Commercial Arbitration (continued)

30. **The Chairman** invited the Commission to resume its consideration of the amendment to article 1, paragraph 2, of the Model Law on International Commercial Arbitration as proposed by the Working Group in paragraph 23 of document A/CN.9/605.

31. **Mr. Castello** (United States of America) said that a decision on the language to be used for the amendment to article 1, paragraph 2, had been deferred, because the Commission had not yet finalized the wording of draft article 17 undecies. The results of the Commission's deliberation would not, however, alter the language in article 1, paragraph 2. His delegation would support the amendment proposed in paragraph 23 as it stood, including the reference to article 17 undecies.

Draft legislative provisions on interim measures and preliminary orders (continued)

Chapter IV bis. Interim measures and preliminary orders (continued)

Article 17 undecies. Court-ordered interim measures (continued)

32. **The Chairman** invited the Commission to resume discussion of article 17 undecies.

33. **Mr. Castello** (United States of America) proposed a revision of the handwritten version of article 17 undecies, discussed at the previous meeting (A/CN.9/SR.823), which began: "A court shall have the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in the courts ..." He proposed that after the words "arbitration proceedings", the following phrase should be inserted: "irrespective of whether their place is in the territory of this State". Also, the word "the" should be deleted before the word "courts", and the phrase "including in cases where the place of the arbitration proceeding is in a country other than the court's" should be deleted.

34. The amended paragraph in full would read:

> "The court shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration".

35. The changes he was suggesting would minimize any risk that the language, especially the word "irrespective", would be viewed as expanding the jurisdiction that national courts would already have in a given system to act with respect to proceedings

abroad. The same purpose would be served by taking out the word "the" before "courts" because "the courts" might commonly be understood as the court system in which a court sat, whereas deleting the word "the" would indicate proceedings generally in courts whether they were domestic or abroad.

36. **Mr. Chan** (Singapore) asked for clarification as to the exact scope of the wording proposed by the United States representative. Did it mean that a court in one country could exercise jurisdiction over arbitration proceedings that were taking place in another country?

37. **The Chairman** said that his understanding of what the Working Group and the Committee had decided was that the court of a given country could not exercise jurisdiction over arbitral proceedings taking place in another country but that it could issue interim measures relating to arbitration proceedings conducted in another country.

38. If he heard no objection, he would take it that the Commission agreed to adopt the text proposed by the United States.

39. *It was so decided.*

Amendment to article 1, paragraph 2, of the Arbitration Model Law (continued)

40. **The Chairman** invited the Commission to resume its consideration of the amendment to article 1, paragraph 2, of the Arbitration Model Law as proposed by the Working Group in paragraph 23 of document A/CN.9/605.

41. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the wording adopted for article 17 undecies satisfied his Association, which was now prepared to accept the inclusion of a reference to article 17 undecies in article 1, paragraph 2.

42. **The Chairman** said that, if he heard no objection, he would take it that the Commission agreed to adopt the revised text of article 1, paragraph 2, proposed by the Secretariat.

43. *It was so decided.*

The meeting was suspended at 4.35 and resumed at 5.10 p.m.

Draft legislative provisions on the form of arbitration agreement (continued)

Revised draft article 7 of the Arbitration Model Law (continued)

44. **The Chairman** invited the Committee to consider the revisions to article 7 proposed by the Working Group in document A/CN.9/606, including the alternative proposal.

Paragraph 1

45. **Mr. Graham Tapia** (Mexico) proposed that the last sentence of paragraph 1 should be deleted because it was unnecessary and contributed nothing to the text. A country that had the Model Law would not need that provision, which had originally been intended to allow flexibility in countries that accorded different treatment to arbitration agreements that were included in the contract to which they referred and arbitration agreements that were signed subsequent to the contract.

46. **The Chairman** recalled that at its January session, the Working Group had considered the alternative proposal for paragraph 1, which was identical to the Mexican text. The idea was to use parallel wording for paragraph 1 in the main proposal and the alternative proposal.

47. **Mr. Castello** (United States of America) said it was his understanding that the alternative proposal was a text that been proposed by the Mexican delegation in the Working Group. It was not his understanding, however, that the Working Group had intended to make the main proposal parallel to the Mexican text. It might be, as the representative of Mexico had claimed, that deleting the second sentence of paragraph 1 in the main proposal for article 7 would ultimately not have any consequence, but it was language which was probably familiar to everyone. It was his understanding that the general rule in the Committee's proceedings was that if a text had been reviewed repeatedly and adopted in the Working Group, it would take more than one delegation's proposal to change it.

48. **The Chairman** said that since the change proposed by the representative of Mexico had nothing to do with the problem of the written form, but rather was an updating of the first paragraph, he had thought that there would not be any objection to it. However, in view of the reservation expressed by the United States, he suggested that the Working Group's version of paragraph 1 should be retained.

49. **Mr. Boulet** (Belgium) said that his delegation supported the position of the United States delegation. He saw no reason to change the text proposed by the Working Group, which was the same as the current text of the Model Law. Paragraph 1 had been discussed at length by the Working Group; it was a text that had existed for a long time, and should be retained. In its written comments (A/CN.9/609/Add.3), his Government had already expressed its reservations about the fact that the Working Group had submitted two different proposals for article 7.

50. **The Chairman** suggested that, in order to avoid confusion, the Commission should not discuss the alternative proposal yet. If he heard no objection, he would take it that the Commission wished to retain the text proposed by the Working Group for article 7, paragraph 1.

51. *It was so decided.*

Paragraph 2

52. **The Chairman** invited members to consider paragraph 2 of article 7. If he heard no objection, he would take it that the Commission wished to adopt the text of paragraph 2 proposed by the Working Group in document A/CN.9/606.

53. *It was so decided.*

Paragraph 3

54. **The Chairman** invited members to consider the Working Group's proposal for paragraph 3 of article 7.

55. **Mr. Bellenger** (France) proposed that the following phrase should be added at the beginning of paragraph 3: "Sans préjudice du consentement donné au contrat ou à la convention d'arbitrage,".

56. **Ms. Rodríguez Pineda** (Guatemala) read out an alternative proposal for paragraph 3 which her delegation had submitted in writing in document A/CN.9/609. The proposal consisted of adding the words "if there exists any record or documentary evidence of its contents" after the word "writing" in the first line, and replacing the words "by conduct" with "through the execution of certain legal documents". Thus, the new paragraph would read:

> "An arbitration agreement shall be in writing if there exists any record or documentary evidence of its contents, regardless of whether the agreement or the contract of which it was a part was concluded orally, through the execution of certain legal documents or by some other means".

57. **Ms. Wermter** (Germany) said that, because paragraph 3 implied that an oral agreement was equivalent to a written agreement, the text should be revised to indicate that the written form requirement set forth in paragraph 2 was met if the content of the agreement was recorded in any form.

58. **Mr. Sorieul** (International Trade Law Division) said that the commentary to paragraph 3 should explain that the new wording had eliminated one of the functions formally fulfilled by article 7, which was to provide evidence not only of the contents of the agreement but also of the consent by the parties to the arbitration agreement. However, in order to avoid giving the impression that parties might be involved in an arbitration agreement to which they had not consented, the commentary should also explain that the question of consent would be covered by the applicable contract laws in the countries concerned. In other words, the new version of paragraph 3 was neutral and could not be used to validate a unilateral contract or act which would compel a person to be a party to arbitration proceedings against his or her will.

59. **The Chairman** recalled that, at the previous session, the Working Group had concluded that it was the content of the arbitration agreement that needed to be put in writing rather than the consent to arbitration. He agreed with the representative of the International Trade Law Division that the explanatory material should provide an explanation of that decision.

60. **Mr. Uzelac** (Croatia) said that there was no room for improvement of the text of paragraph 3. However, the background material should be comprehensive and should include an outline of the issues and questions that the Working Group had had to consider.

61. **Mr. Castello** (United States of America) endorsed the view that the background material should explain that the requirements for consent would be covered by national legislation.

62. **Mr. Sorieul** (International Trade Law Division) drew the Commission's attention to the last sentence of paragraph 9 of the general remarks on paragraph 3 and pointed out that it referred back to discussions covered in paragraph 27 of document A/CN.9/508, as well as discussions that had taken place at the thirty-fourth

session in 2001. The case covered in the sentence also corresponded to the situation described in paragraph 12 (d) of document A/CN.9/606. He wished to ensure that the last sentence of paragraph 9 was agreeable to the Commission and suggested that it could be included in a commentary to the text.

63. **Mr. Boulet** (Belgium) said that it was almost impossible to separate the idea of a document that gave evidence of the content of an agreement and a document that gave evidence of some sort of initial agreement. If content was established in a document, that same document should provide some initial evidence that the content had been the subject of an agreement or, at least, that the content emanated from one of the parties. If the elements of content and consent were completely separated, the document envisaged in paragraph 3 would be an external document, with no connection whatsoever to the parties.

64. **Mr. Sorieul** (International Trade Law Commission) said that paragraph 3 was designed to be ambiguous and that the wording satisfied both those who wished the written form to emanate from the parties and those who did not. He was therefore of the opinion that the text should be maintained in its present form. The explanatory material should mention that general law on consent continued to be applicable and should provide several examples of cases which were not intended to be addressed by that paragraph.

The meeting rose at 6 p.m.